

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA SHAW)	
Claimant)	
)	
VS.)	
)	
ORSCHELN FARM HOME SUPPLY)	
Respondent)	Docket No. 202,218
)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the January 28, 2010 Post-Award Medical Award by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Ali N. Marchant, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Post Post-Award Medical Award (Award).

ISSUES

The ALJ found that the claimant's medical condition continues to deteriorate and as such, she now requires skilled nursing home care. The ALJ went on to conclude that although the treating physician designated a particular nursing home to provide claimant's care, the designation of a specific nursing home is not, under these circumstances, a medical issue. Thus, respondent retained the right to designate which facility was to be

used. He went on to find that pending such placement respondent is directed to increase claimant's home health care hours to 8 hours per day to ensure claimant's present needs are met.¹

The respondent requests that the Board reverse this decision arguing that the claimant has not met her burden of proof that placement in a long-term skilled nursing facility is reasonable and necessary to cure her from the effects of her work-related injuries. Similarly, respondent contends that the claimant has not met her burden of proof that an increase of 8 hours per day of home health care is necessary.

Claimant asks the Board to affirm the ALJ's decision to increase her daily home health care hours, but also asks the Board to modify the ALJ's denial of her request for a specific referral to a nursing home closer to her family, as recommended by Dr. Abay. Claimant maintains that Dr. Abay's referral to Brighton Gardens, in Prairie Village, Kansas, is appropriate and should be implemented.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are particularly detailed, accurate, and well supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this Order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Claimant's August 17, 1993 vocational accident has left her with significant and ever-increasing injuries. There is largely no dispute between the parties as to claimant's need for care. It is the extent of that care that is at the heart of this appeal. While claimant has strived to remain as independent as she could under the circumstances, her independence is now gone. She suffers from "residual quadriparesis" which leaves her with weakness in both of her upper and lower extremities.

. . . she is no longer able to cook, do laundry, or drive. She is also incontinent and progressive weakness and spasticity have rendered her incapable of addressing

¹ The ALJ also granted claimant's counsel attorney's fees in the sum of \$2,576.50, a finding that has not been appealed. Claimant's counsel has also asked for additional fees for time incurred in pursuing this appeal. That issue should be addressed by the ALJ and will not be decided in this appeal.

most of her personal needs and activities of daily living. Claimant is no longer able to use the toilet, or to get in and out of the shower, without assistance.²

In January 2008, when claimant was more functional, Dr. Eustaquio Abay, the authorized treating physician, indicated that claimant required home health care to aid her in her daily activities and help preserve her independence. Home health care was provided for 8 hours per day, 7 days a week. But, as anticipated by Dr. Abay, claimant's physical limitations and demands have increased. According to Dr. Abay, claimant requires 24 hour care and he referred claimant to the Brighton Gardens nursing home at 7105 Mission Road, Prairie Village, Kansas. Admittedly, Dr. Abay had no particular familiarity with the Brighton Gardens facility, **"and the record is devoid of any information to suggest that Brighton Gardens is uniquely equipped to meet [c]laimant's needs"**³, but this facility is apparently close to claimant's remaining family members and she prefers this placement over a facility elsewhere in Pratt, Kansas (where she presently resides). Dr. Abay acknowledged that he had not seen claimant since 2008, but given her uncontroverted deterioration in her condition, all of which he anticipated would occur in light of her injuries, his referral to a skilled nursing facility was an inevitability. He went on to testify that placement at a facility in the Kansas City area, near family, would benefit the claimant. Alternatively, he indicated that if claimant was to remain in her home she would require 24 hour attendance as she requires help getting to the bathroom, even at night and otherwise risks falling if she attempts to go on her own.

On the heels of her request for nursing home placement, respondent took steps to *decrease* claimant's home health care from 8 hours per day to 4. As a result -

The current schedule provides sufficient assistance for most of [c]laimant's basic needs. However, if she has to be transported for a medical appointment, and her four hour per day allotment is exceeded, the excess time over four hours is deducted from time available to her in the ensuing days. Claimant has had occasions where, because of medical appointments, she "used up" her allocation of home health care before the weekend, leaving her with no assistance at all on the weekend.⁴

In short, respondent's decision to cut claimant's health care hours has created an unacceptable scenario:

Claimant is now incontinent, and wears Depends undergarments. She is frequently unable to toilet without assistance. With only four hours of home health

² ALJ Award (Jan. 28, 2010) at 3.

³ *Id.* at 5 (emphasis added).

⁴ *Id.* at 4.

care, and an inability to toilet herself in the absence of home health care aides, [c]laimant may have to wear soiled undergarments until the next time a home health care aide is present. If [c]laimant has “used up” her home health care allotment because of trips to and from medical appointments, [c]laimant could conceivably go days without having her Depends changed or being cleaned up. This condition is medically unacceptable.⁵

Even Micha Schmidt, a registered nurse, who works for the home health care agency assigned by respondent to provide claimant care, has testified that claimant’s present care is essentially inadequate, given the prospect that claimant would remain in soiled undergarments for an undetermined period of time. According to Ms. Schmidt, it is not within the realm of good nursing practice in a nursing facility to let a patient remain soiled.⁶ And if claimant is unable to keep her home, particularly the bathroom and the kitchen, sufficiently clean, this will impact her overall health and safety.

The ALJ noted that respondent and its carrier have the obligation to provide -

...such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee ... as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁷

And K.A.R. 51-9-10(c) provides that:

Nurses, whether registered or practical, shall be furnished in an institution or the worker’s home **when the treating doctor recommends this nursing care.** (Emphasis added)

The ALJ acknowledged that respondent did not dispute its obligation to provide medical care. But respondent argued that Dr. Abay’s referral for skilled nursing care, particularly at a specific facility in Prairie Village, Kansas, is beyond the scope of the respondent’s obligation and the provisions of the Kansas Workers Compensation Act.

Respondent argues that it is meeting all of [c]laimant’s “medical treatment” needs as mandated by this court and the Workers Compensation Appeals Board⁸, with its

⁵ *Id.* at 4.

⁶ Schmidt Depo. (Jan. 11, 2010) at 15-16.

⁷ ALJ Award (Jan. 28, 2010) at 5, citing K.S.A. 44-510h(a).

⁸ There was an earlier appeal in this matter (2009 WL 298331, Kan. WCAB Jan. 30, 2009) stemming from Dr. Abay’s initial recommendation for home health services and the nature and extent of those services.

four-hour per day allowance of home health care. Respondent contends that a nursing home placement is neither reasonable nor necessary.⁹

Like the ALJ, the Board finds that Dr. Abay's referral for skilled nursing care is appropriate under these circumstances. Claimant's condition continues to deteriorate and this deterioration is not unexpected given the nature of her injury. Despite her valiant efforts to remain independent, she has succumbed to incontinence, overwhelming weakness, dependence on assistive devices, not to mention the additional challenge of a reduced window of opportunity to have assistance with her fundamental daily activities. Again, like the ALJ, the Board is persuaded that claimant's home health care hours should be increased to 8 hours per day until such time as she can be placed in an appropriate skilled nursing facility. **This placement should be at the earliest possible date.**

As noted by the ALJ, a specific nursing home referral is not a true medical issue. The Board has considered a similar issue in *Finney*¹⁰ but there, claimant was a paraplegic and required specialized care during his recovery from surgery so as to ensure that he would not suffer from bed sores and other complications known to occur following surgery. Thus, his desire to go to the Craig Hospital, in Denver, Colorado was granted.

Here, there is nothing in the record that would suggest that Brighton Gardens is specifically suited to meet claimant's medical needs. Even claimant conceded that any nursing home would meet her needs, but that being closer to her family would be preferable.¹¹ Dr. Abay echoed that view but again, there is nothing unique about Brighton Gardens other than its location and the fact that Dr. Abay mentioned that facility in his referral.

The Board agrees with the ALJ's analysis in this matter. The decision to grant claimant's request for a nursing home placement is indeed a medical issue and is well within the court's purview but the location of that nursing home placement is not a medical issue. However, it is worth noting that during the pendency of this dispute surrounding claimant's need for home health services, Ms. Schmidt has certainly advocated the importance of family and friends in aiding claimant in managing her ongoing *nonmedical* needs.¹² By placing claimant in a facility far from her family, in a smaller community where she has no friends, seems to purposefully provide a barrier to claimant's independence that is unwarranted.

⁹ ALJ Award (Jan. 28, 2010) at 6.

¹⁰ *Finney v. Finns Electric Company, Inc.*, No. 216,317, 2009 WL 3191371 (Kan. WCAB Sept. 18, 2009).

¹¹ Claimant's Depo. at 39.

¹² Schmidt Depo. (July 21, 2008) at 18-20.

In summary, the ALJ's Post-Award Medical Award is affirmed in every respect. Respondent shall immediately reinstate claimant's home health care services for 8 hours per day, 7 days per week, pending her placement in a skilled nursing facility.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 28, 2010, is affirmed in every respect. The claimant's request for additional attorney's fees associated exclusively with this appeal is remanded to the ALJ for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge